Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

78-1853

MCDONNELL DOUGLAS CORPORATION,
Petitioner,

– against –

GENERAL TELEPHONE COMPANY OF CALIFORNIA
AND
GENERAL TELEPHONE AND ELECTRONICS CORPORATION
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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(Filed: June 8, 1979)

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IN THE

Supreme Court of the United States

October Term, 1979

No. .....

MCDONNELL DOUGLAS CORPORATION,

Petitioners,

v.

GENERAL TELEPHONE COMPANY OF CALIFORNIA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners ask that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit entered on January 2, 1979.

Opinions Below

The Opinion of the United States Court for the Ninth Circuit, which affirmed the decision without written opinion of the United States District Court for the Central District of California (Ferguson, J.), is not officially reported as yet and appears as Appendix A to this petition. Order requesting Defendant to file a supplemental brief responding to plaintiff-appellant petition for rehearing with suggestion for rehearing en banc not officially reported, appears as Appendix B.

The Order denying the petition for rehearing appears as Appendix C. The Order staying issuance of Mandate appears as Appendix D.

Jurisdiction

The judgment of the Ninth Circuit was dated and entered January 2, 1979 (Appendix A). The Orders denying a timely petition for rehearing and suggestion for rehearing en banc were dated and entered on April 25, 1979 (Appendix C). The Order staying issuance of Mandate til June 8, 1979 was entered on May 9, 1979.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). The jurisdiction of District Court was founded on 28 U.S.C. §§ 1331 and 1332; 47 U.S.C. § 207 and the doctrine of pendent jurisdiction.

Questions Presented

The issues presented to the Ninth Circuit involved questions that are essentially and jurisdictionally important, both in the area of federal taxation and federal communications law. The latter is the central issue of this petition since the Court seems to have mistakenly stylized the facts presented by affidavit in the summary proceedings and has inadvertently narrowed the scope of federal jurisdiction in its attempt to not unnecessarily expand the scope of federal jurisdiction.

The Opinion totally ignored the holding of the 6th Circuit Court of Appeals in *Ward* v. *Northern Ohio Telephone Company*, 300 F.2d 816 (1962), (6th Cir. 1962), when the Opinion holds that despite the fact that General Telephone was declared to be an interstate common carrier, the discrimination provisions of the Federal Communications Act do not apply. The Ward case, *supra*, dealt specifically with the matter before the Court and held even that §§ 201-205 of the Act applied to any carrier which is engaged in intrastate communications even though such carriers engage solely through

physical connection with the facilities of another carrier which is engaged in interstate communication.

Also the Opinion endorsing District Court Judge Weinfeld's opinion in duPont Glore Forgan, v. American Telephone & Telegraph Co., *duPont Glore Forgan, Inc.* v. *Am. Tel. & Tel. Co.*, 437 F. Supp. 1104 to 1131 (S.D.N.Y. 1977), *aff'd. mem.*, No. 77-6148, 6154 (2d Cir., March 17, 1978), *cert. denied*, 47 U.S.L.W. 3327 (U.S. Nov. 13, 1978), totally misunderstood Judge Weinfeld's holding referred to in footnote [2] of this Opinion (Appendix A) which held that the Communications Act of 1934 prohibits discrimination such as is indicated in this case and applies if evidence of discrimination is shown establishing discrimination. Judge Weinfeld stated

> "Plaintiffs refer to the defendants' duties of fairness and nondiscrimination under federal and nondiscrimination under federal and state law; however, they have presented no proof that the defendants have violated the statutes to which they refer."

The Opinion overlooked Judge Weinfeld's ruling involving certification of class action, *duPont Glore Forgan, Inc.* v. *American Telephone & Telegraph Co.*, 69 F.R.D. 481. In this Opinion, Judge Weinfeld stated:

> "The fact that Centrex is, as defendants contend, a local telephone exchange service, subject to the jurisdiction of state and local regulatory authority does not diminish the right of Centrex customers to the claimed exemption and no state regulatory body may override the federal statute which permits the exemption."

In addition to the above, the Opinion, in fact, narrowed federal jurisdiction severely by holding that the practice of General Telephone Company of California, i.e., Practice C200.105 entitled "Billing of Federal Excise Tax," was not a matter of Federal concern, ignoring completely the holding of *Benanti* v. *United States of America*, 355 US 96, 2 L ed 2d 126, 78 S.Ct. 155, Dec. 9, 1957, which held that both in-

trastate and interstate communications come within the scope of Section 605 of the Federal Communications Act in the following language at page 132:

> "The Federal Communications Act is a comprehensive scheme for the regulation of interstate communication. In order to safeguard those interests protected under § 605, that portion of the statute pertinent to this case applies both to intrastate and to interstate communications."

The Court in its Opinion also overlooked the exception regarding the applicability of the anti-discriminatory section (§ 202) of the Communication Act of 1934 which makes that section applicable to those carriers that are primarily intrastate described in 47 U.S.C. 152 (b) (2)-(4). This exception, in essence, provides that § 202 entitled "Discrimination and Preferences" is equally applicable to intrastate carriers engaged in interstate communications solely through physical connection with the facilities of another carrier.

Finally, the Opinion severely restricts the often cited holding of *American Trucking, Inc.*, v. *F.C.C.*, 377 F.2d 121 (D.C. Cir. 1966); cert. denied February 27, 1967, 87 S.Ct. 973, which in reference to § 202(a) of the 1934 Act stated:

> "These contentions of the Company are obviously erroneous, it seems to us. The prohibition against different charges to different customers for like services under like circumstances is flat and unqualified. The pertinent section of the statute bristles with 'any' unjust discrimination by 'any' means, or to make 'any' undue preference to 'any' particular person, or to subject 'any' person to 'any' undue prejudice. Moreover it is quite clear that this is not a matter of chance statutory semantics. It is a matter of public interest and policy."

The above, by way of preliminary statement, shows the overall importance of the holding contained in the Opinion. In a nutshell, this Federal Court of Appeals Opinion if left unchanged will hold that despite federal common law, federal statutes and federal case law, the collection of *federal* excise tax on communications service by General Telephone of California held to be a common carrier by an opinion written by Chief Justice Burger in *General Telephone Co. of California* v. *F.C.C.*, 413 F2d 390 (1969), D.C. Cir. (1969) Cert. denied October 27, 1969, 90 S.Ct. 173, is not within the purview of federal jurisdiction without benefit of trial and in face of admitted genuine issues of fact regarding interstate v. intrastate services.

Statutes Involved

A. *Internal Revenue Code*

"Section 4251(a)(1) of the Internal Revenue Code, 26 U.S.C. § 4251(a)(1), as amended by the Excise Tax Reduction Act of 1965, 79 Stat. 145 (1965), reads:

> 'Except as provided in subsection (b), there is hereby imposed on amounts paid for the following communication services a tax equal to the percent of the amount so paid specified in paragraph (2):
>
> Local telephone service.
> Toll telephone service.
> Teletypewriter exchange service.
>
> The taxes imposed by this section shall be paid by the person paying for the services.'

Section 4252(a) and (d) of the Internal Revenue Code, 26 U.S.C. § 4252(a), (d), read in relevant part:

'(a) Local telephone service.—For purposes of this subchapter, the term 'local telephone service' means—

(1) the access to a local telephone system, and the privilege of telephonic quality communication with substantially all persons having telephone or radio telephone stations constituting a part of such local telephone system, and

(2) any facility or service provided in connection with a service described in paragraph (1).

The term 'local telephone service' does not include any service which is a . . . 'private communication service' as defined in [subsection] . . . (d).

* * *

(d) Private communication service.—For purposes of this subchapter, the term 'private communication service' means—

(1) the communication service furnished to a subscriber which entitles the subscriber—

* * *

(B) to the use of an intercommunication system for the subscriber's stations,

regardless of whether such . . . intercommunication system may be connected through switching with a service described in subsection (a), (b), or (c),

* * *

except that such term does not include any communication service unless a separate charge is made for such service."

B. *Federal Communications Act of 1934* — (47 U.S.C. §§ 152, 153(e), 202, 206 & 207

§ 152. APPLICATION OF CHAPTER

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

(b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except

for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201-205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2)-(4) of this subsection. June 19, 1934, c. 652, Title 1, § 2, 48 Stat. 1064; 1946 Proc. No. 2695, eff. July 4, 1946, 11 F.R. 7517, 60 Stat. 1352; Apr. 27, 1954, c. 175, § 1, 68 Stat. 63.

§ 153(e). DEFINITIONS

(e) "Interstate communication" or "interstate transmission" means communication or transmission (1) from any State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, (2) from or to the United States to or from the Canal Zone, insofar as such communication or transmission takes place within the United States, or (3) between points within the United States but through a foreign country; but shall not, with respect to the provisions of subchapter II of this chapter (other than section 223 of this title), include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

(h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not,

insofar as such person is so engaged, be deemed a common carrier.

§ 202. DISCRIMINATIONS AND PREFERENCES

(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication services, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services, whenever referred to in this chapter include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $500 for each such offense and $25 for each and every day of the continuance of such offense. June 19, 1934, c. 652, Title II, § 202, 48 Stat. 1070; Sept. 13, 1960, Pub. L. 86-751 74 Stat. 888.

§ 206. CARRIERS' LIABILITY FOR DAMAGES

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing

in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case. June 19, 1934, c. 652, Title II, § 206, 48 Stat. 1072.

§ 207. RECOVERY OF DAMAGES

Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies. June 19, 1934, c. 652, Title II, § 207, 48 Stat. 1073.

Statement of the Case

The federal excise tax, paid by Petitioner for which damages are sought in this action, is imposed on communication services by Sections 4251-4254 of the Internal Revenue Code, which sections were substantially amended and revised effective January 1, 1966, by the Federal Excise Tax Reduction Act of 1965, Act of June 21, 1965, P.L. 89-44, 79 Stat. 136 (1965). Section 4251(a) provides that the tax shall be imposed on amounts paid for the use of "local telephone service" as defined in Section 4252(a). Section 4252(a) excludes from the definition of "local telephone service" any

service which is a "private communication service" as that term is defined in Section 4252(d). Section 4252(d), as amended in 1965, defines "private communication service" as the service and equipment furnished to allow intercommunication among a customer's telephone stations, "except that such term does not include any communication service unless a separate charge is made for such service."

PBX including Centrex is within the scope of "private communication service" and thereby is exempt, insofar as it is used for intra-office communication, from the federal excise tax. Section 4252(d)(1)(B) applies to an "intercommunication system for subscriber's stations regardless of whether such * * * intercommunication system may be connected through switching" with the telephone exchange. Likewise, by the inclusion in the definition in Section 4252(d)(2) and Section 4252(d)(3) "switching capacity * * * necessary or unique to the use of intercommunication systems," in the Federal Excise Tax Reduction Act of 1965, Congress clearly contemplated Centrex to be within the exemption.

Congress acted in order to treat all private communication services alike, and gave reasonable time to separate the charges, required for the exemption to be applied to Centrex. In H.R. Rep. No. 433, 89th Congr., 1st Sess. 31 (1965), the report on the Federal Excise Tax Reduction Act of 1965, the House Committee on Ways and Means noted:

> "For the reasons indicated above, your committee's bill provided an exemption from the tax on local telephone service for private communications service if a separate charge is made for this service. It is understood that private lines and PBX systems generally will *immediately* qualify for this exemption. However, it is understood that Centrex systems—where the switching equipment is generally on the premises of the local exchange rather than on that of a subscriber—generally do not, *as yet*, provide for a charge which is separate and distinct from that for local telephone service. *Until* such a separation is made, this exemption, therefore, will not

apply in the case of Centrex service."
(Emphasis added)

Section 4291 of the Internal Revenue Code requires that the operating telephone companies collect the proper amount of the excise tax on communication services. Petitioner does not file excise tax returns. It relies upon General Telephone Company of California to calculate accurately and to collect fairly the proper amount of tax due.

General Telephone Company of California has had the capability of making, or causing to be made, the separation of charges required for exemption under Section 4252(d) at all times since 1961, but they either willfully or negligently failed to do so until August 10, 1971, knowing that the effect of such inaction, after January 1, 1966, was to require Petitioner to pay greater amounts of excise taxes than it would have been obliged to pay had General Telephone Company of California made or caused to have been made, the requisite separation of charges on January 1, 1966 or had Petitioner had any other PBX type service.

Thus, from January 1, 1966 until approximately mid-1971, General Telephone collected, or caused to have been collected an unduly large amount in excise taxes from Petitioner and Petitioner paid the operating telephone company excise taxes which were not in fact due and which, during the same period, were not charged on other PBX systems like the Centrex-PBX system. This fact that the services of other like PBX systems were not taxed by General Telephone was not disputed and is discriminatory in nature.

Reason for Granting the Writ

The Federal Communications Act of 1934, 48 Stat. 1070 (1934), as amended, 47 U.S.C. §§ 201-223, makes it "unlawful for any common carrier to make any unjust or unreasonable discrimination . . . in practices, classifications or regulations . . . for or in connection with like communication service, directly or indirectly by any means or device . . ." In

addition, this Act makes it unlawful for any common carrier "to make or give any undue or unreasonable preference or advantage to any particular person, class of persons . . . to any undue or unreasonable prejudice or disadvantage."

It was clear from the record before the Ninth Circuit Court, particularly General Telephone's own argument that General Telephone did in fact discriminate against Petitioner as a subscriber of Centrex service by failing to separate the charge for that service until late 1971, a period of at least 5-1/2 years. General Telephone, as justification for their actions, cite an interpretation of the legislative history for the Federal Excise Tax Reduction Act of 1965. Their interpretation is that General Telephone was given a license by Congress to tax or not tax depending on how General Telephone views the "opportunity to improve their competitive position."

Petitioner's argument is simple. Section 202 of the Federal Communications Act of 1934 set forth herein has been violated by General Telephone and, such violation entitles Petitioner to damages under Section 206, *Carriers' liability for damages*, and under Section 207, *Recovery of damages*, of the Act.

General Telephone argued and the Opinion in question held that the matter before the Court concerns intrastate commerce and this matter is not subject to the Federal Communications Act of 1934, 48 Stat. 1070 (1934), as amended, 47 U.S.C. §§ 201-223.

As Petitioner has shown in its affidavits submitted to the Circuit Court, this point is not clear, in fact, the service for which the rate is charged, in the case of Centrex, is more clearly interstate in nature. General Telephone admitted that this is a genuine issue of fact. GTC in its affidavit in support of its Motion which the Opinion granted states that "interstate private lines and telephone calls made from a GTC supplied Centrex station are governed by American Telephone and Telegraph Company tariffs on file with the Federal Communications Commission."

GTC is, in essence, stating that Centrex phones and switching equipment are physically connected within the meaning of 47 U.S.C. 152, subparagraph (b) (2)-(4). This statute entitled "Application of chapter" cited by Ninth Circuit's Opinion on Page 8 reads in pertinent parts as follows:

> "b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication *solely through physical connection with the facilities of another carrier* not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier . . . *except that sections 201-205 of this title shall, except as otherwise provided therein,* apply to carriers described in clauses (2)-(4) of this subsection. June 19, 1934, c. 652, Title I, § 2, 48 Stat. 1064; 1946 Proc. No. 2695, eff. July 4, 1946, 11 F.R. 7517, 60 Stat. 1352; Apr. 27, 1954, c. 175, § 1, 68 Stat. 63."
> (Emphasis added)

Petitioner's affidavit which Respondents did not contradict or move to strike states as follows:

> "7. In order to clearly understand Mr. Hester's Affidavit II, it should be noted that the Centrex telephones and switching equipment provided to McDonnell Douglas by GTC are arranged to make and receive telephone calls, internal to the Centrex system, within the local exchange, intrastate calls and interstate calls both over the national telephone dial system and over intrastate or interstate private tielines. Interstate toll telephone calls made from GTC supplied Centrex stations are billed by GTC based on AT&T tariffs on file with the Federal Communications Commission. A Centrex station is common to all telephones within the national telephone dial system (both intrastate and interstate) and is indivisable of other telephone company plant and facilities used for interstate telephone calls. *The rate charged by GTC for a Centrex station includes a charge for the switching and recording equipment designed for and used to identify all telephone calls placed beyond the local telephone exchange.* GTC refers to this basic feature of their Centrex service as "station identification of outward dialed calls".

> "4. The General Telephone Company PBX system used by MDC at Huntington Beach prior to the Centrex system's installation was not taxed on the intrasystem service. When MDC subscribed to the Centrex service, that service, *utilizing the same intrasystem equipment with the exception of the switching vehicle which was removed from our premises to General Telephone Company's premises, was totally taxed.* The switching vehicle was dedicated totally to MDC utilization and, to my knowledge is, at this time, totally utilized by MDC. Subsequent to the installation of the Centrex system, MDC was taxed by General Telephone Company on its total Centrex bill including that service which included utilization of the same telephones which had formerly been used with the PBX system."

Section 202 provides that unjust discrimination and preferences are unlawful "for any common carrier". The Act defines a common carrier at 47 U.S.C. § 153 (6) as follows:

> "h) 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

Jurisdiction under the Federal Communications Act has been applied by the federal courts to telephone companies in

the instance when telephone companies had all of their facilities located in one state and which were engaged in intrastate telephone communications except for physical connection with carriers in other states.

In Ward v. Northern Ohio Telephone Company, 300 F.2d 816 (1962), (6th Cir. 1962), the court explained its jurisdiction under these circumstances as follows:

> "Appellee telephone company contends that it does not come under Title 47 U.S.C.A. §§ 206 and 207, heretofore referred to, which provide for the carrier's liability for damages and suit for recovery thereof, since it is not a 'common carrier', subject to the provisions of this chapter, and that it is subject to the Act only for accounting and reporting services. Appellee further submits that the foregoing statutory sections do not apply to it, as it carries on only intrastate business.
>
> When we examine the above-mentioned exception in the statute, we find that Sections 201-205 of the Act, relating to services, charges, unlawful discriminations, and preferences apply to any carrier, which is engaged in interstate communication solely through physical connection with the facilities of another carrier, or to any carrier, which is engaged in interstate communication solely through connection by radio, or by wire and radio with facilities of another carrier located in an adjoining state."

The Opinion as it now stands incorrectly adopts General Telephone's position without trial on "the apparent fact that none of the disputed charges here were for calls made from Centrex phones into interstate nets", footnote [3] p. 10 of Opinion. The record simply does not support such a statement. Centrex and PBX phones make calls in-plant and to every area of the globe.

This case involves the power to impose or not to impose a federal tax, an undeniable national question. The tax is a

burden on communications services, both intrastate and interstate. As Chief Justice Burger pointed out in *General Telephone Co. of Calif.* v. *F.C.C., supra,* "The Act must be construed in light of the needs for comprehensive regulation and the practical difficulties inhering in state by state regulation of parts of our organic whole . . ."

Conclusion

Petitioner respectfully requests this Court to grant certiorari and upon that grant, to reverse the judgment below and allow a trial on the issue of discrimination under the Communication Act of 1934 or remand the case for a determination of damages.

Dated: Long Beach, California
June 8, 1979

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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U. S. COURT OF APPEALS

MCDONNELL DOUGLAS CORPORATION Plaintiff-Appellant v. GENERAL TELEPHONE COMPANY OF CALIFORNIA and GENERAL TELEPHONE AND ELECTRONICS CORPORATION Defendant-Appellee	NO. 75-3131 OPINION

Appeal from the United States District Court
for the Central District of California

Before: CARTER and HUFSTEDLER, Circuit Judges, and C. WILLIAM KRAFT, JR., District Judge.*

CARTER, Circuit Judge:

McDonnell Douglas appeals here from an order granting General Telephone's[1] motion for summary judgement in a suit in which McDonnell sought to recover excise taxes paid over a five and one-half year period on telephone services provided by General Telephone. The thrust of the district court's order was that McDonnell had failed to state any cause of action under applicable federal statutory or common law.

McDonnell's appeal presses the view that at least three causes of action were stated: First, General Telephone's collection of excise taxes between 1966 and 1971 violated a

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*Honorable C. William Kraft, Jr., Senior District Judge, Eastern District of Pennsylvania, sitting by designation.

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duty imposed on General Telephone by the Federal Excise Tax Reduction Act of 1965, 26 U.S.C. §§ 4251-4254 ("the 1965 Act") to conduct its billing practice so as to confer the benefits of the Act on its customers, including McDonnell. Second, General Telephone's billing practice was discriminatory as to McDonnell and thus violated the anti-discrimination provisions of the Federal Communications Act of 1934, 47 U.S.C. § 202 as amended ("the 1934 Act"). Finally, McDonnell argues that General Telephone violated a fiduciary duty owed to its customers, including McDonnell, when it established and carried out the particular billing practices which resulted in McDonnell's having to pay the disputed excise taxes.

General Telephone argues in support of the district court that no cause of action was stated, and also contends that, as to the claim based on discrimination arising out of the 1934 Act, a statute of limitations would preclude recovery anyway. It also argues that it is not a proper party from whom McDonnell should seek a refund of taxes. Rather, section 7422(f)(1) of the Internal Revenue Code, 26 U.S.C. § 7422(f)(1) requires that such action be brought only against the United States.

We find that McDonnell has failed to state any cause of action under the federal statutes cited and under the common law. We therefore affirm the decision of the lower court.

I. FACTS

McDonnell is a long-time customer of General Telephone Company of California, a wholly-owned subsidiary of co-appellee General Telephone and Electronics Corp. During the time period relevant to this dispute, McDonnell subscribed to

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at least two different kinds of telephone service from General Telephone: conventional service which gave McDonnell access to the world-wide commercial telephone communications net available to telecommunications users generally, and a private branch exchange (PBX) system which facilitated McDonnell's internal communications. General Telephone apparently offered PBX systems in different modes, one of which was called "CENTREX" and which was used by McDonnell in its internal communications.

The seeds of this dispute were sown in 1965 when Congress amended the Internal Revenue Code to exempt "private communications service" from federal communications excise taxes. Federal Excise Tax Reduction Act of 1965, 46 U.S.C. §§ 4251-4254. Under these amendments, PBX systems were intended to qualify for the tax exemption, but only if customers were billed separately for internal and external use. See H.R. Rep. No. 433, 89th Cong., 1st Sess. 31 (1965), 1965 U.S. Code Cong. & Admin. News 1645, 1677. CENTREX services received by McDonnell were billed together with conventional telephone services and for that reason, they did not immediately qualify for the exemption. The present dispute matured when General Telephone finally separated its CENTREX and conventional charges at McDonnell's request--five and one-half years after the Excise Tax Reduction Act became effective--but declined to reimburse McDonnell for the taxes paid during that period.

II. ISSUES

A. Does the Excise Tax Reduction Act of 1965 impose a duty upon General Telephone to change its billing practice so as to confer the benefits of the Act on McDonnell?

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B. Is General Telephone's billing practice with respect to CENTREX service subject to federal scrutiny so as to give rise to a cause of action under the Federal Communications Act of 1934 where discrimination is alleged? If so, does a statute of liminations bar recovery?

C. Does General Telephone owe a separate common law fiduciary duty to McDonnell to formulate billing policies that would minimize McDonnell's excise taxes?

D. Is General Telephone the proper party from whom McDonnell should seek recovery of the money paid as federal excise taxes?

III. DISCUSSION

A. The 1965 Act

Insofar as it applies to the facts of this case, the 1965 Act provides for an excise tax on local telephone service (26 U.S.C. § 4251(a)(1)), but excludes from coverage of the tax "private communications services . . . [if] a separate charge is made for such service." 26 U.S.C. § 4252(a), (d). Thus McDonnell's CENTREX service was taxed because it was billed to McDonnell along with charges for conventional service. It is clear that Congress contemplated such a result when it passed the 1965 Act. The legislative history of the bill, found in H.R. Rep. No. 433, 89th Cong. 1st Sess. 31 (1965), 1965 U.S. Code Cong. & Admin. News 1645 at 1677 states:

> "It is understood that private lines and PBX systems generally will immediately qualify for this exemption. However, it is understood that Centrex systems--where switching equipment is generally on the premises of the local exchange rather than on that of the subscriber--generally do not, as yet, provide for a charge which is separate and distinct from that for local telephone service. Until such separation is made, this exemption, therefore, will not apply in the case of Centrex service."

McDonnell argues that there is implicit in the Act and its legislative history a duty placed upon utilities providing telephone service to separate charges for CENTREX services so that they qualify for the exemption. It supports this argument with the observation that if the Act does not impose such a duty, then it confers upon General Telephone and other utilities excessive discretion to determine whether or not its customers have to pay federal excise taxes. It looks at the words "as yet" and "until" in the text of the legislative history and contends they should be interpreted so as to require a change in a utility's billing practice if the service to which a customer subscribes does not qualify for the exemption.

Essentially identical arguments were made in DuPont Glore Forgan, Inc. v. Am. Tel. & Tel. Co., 437 F. Supp. 1104 at 1131 (S.D.N.Y. 1977), aff'd mem., No. 77-6148, 6154 (2d Cir., March 17, 1978), cert. denied, 47 U.S.L.W. 3327 (U.S. Nov. 13, 1978) (No. 78-317). In the portion of that opinion directly applicable to this claim, and with which we generally agree,[2] Judge Edward Weinfeld noted that neither the language of the Act nor the legislative history evidence a clear imposition of a duty to establish separate charges for CENTREX service. Furthermore, making a taxpayer's tax liability dependent upon the actions of one of the parties to a particular taxable transaction is not uncommon under the Internal Revenue Code. It follows, therefore, that General Telephone's discretion to separate or not separate CENTREX charges was absolute under the 1965 Act.

In light of Judge Weinfeld's discussion of this issue in 437 F. Supp. at 1131-34, we find it unnecessary to elaborate or cite further authority. We merely hold, consistent with that decision, that the 1965 Act does not impose a duty upon General Telephone to separate charges for CENTREX services from charges for normal telephone services in its bills to McDonnell.

B. The 1934 Act

McDonnell next claims that General Telephone's billing practice violated the anti-discrimination provisions of the 1934 Federal Communications Act, 47 U.S.C. § 202. That section provides as follows:

> "(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

The discrimination here, McDonnell contends, lies in the fact that its CENTREX costs were higher than fees paid by other customers of General Telephone who received similar service but happen to have subscribed to a P.B.X. system which was billed separately and thus not subject to the excise tax.

General Telephone counters with the argument that CENTREX service, being entirely intrastate in nature, is exempt from the coverage of the Act under section 152(b) of the Act, which excludes "charges, classifications, practices, services, facilities, or regulations for or in connection with intra-

FPI-Sandstone 8-23-71—10034—8048

state communication service by wire or radio of any carrier[.]" This provision was clearly intended to give states significant power to regulate wire communications that are wholly intrastate in nature. In the debates which preceeded passage of the 1934 Act, Senator Dill, the Senate manager of the bill, stated, apparently with reference to § 152:

> "We have attempted . . . to reserve to the State commissions the control of intrastate telephone traffic [in contrast to the jurisdiction left to the states over intrastate commerce following Houston, E. & W.T. Ry. v. United States, 234 U.S. 342 (1914).] . . .
>
> "We have attempted, in this proposed legislation, to safeguard State regulation by certain provisions to the effect that where existing intrastate telephone business is being regulated by a State commission, the provisions of the bill shall not apply. . . . " 78 Cong. Rec. 8823 (1934).

Subsequent decisions interpreting the Act have sought to preserve state control against federal jurisdictional encroachment. See Kitchen v. F.C.C., 464 F.2d 801 (D.C. Cir. 1972); Ivy Broadcasting Co. v. American Tel. & Tel. Co., 391 F.2d 486, 494, n. 6 (2d Cir. 1968); United States v. State Corporation Comm'n, 455 F. Supp. 843 (E.D. Va. 1972), aff'd 409 U.S. 1094 (1973).

We do not wish to unnecessarily expand the scope of federal jurisdiction in this area when it was the clear intent of Congress and other courts to limit that jurisdiction.

Counsel for McDonnell has forcefully and ably argued that what is involved here is not simply intrastate services, as to which the California Public Utilities Commission has exclusive jurisdiction in the first instance, but rather the discriminatory manner in which General Telephone carried

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out its congressionally mandated duties as a collector of federal excise taxes on those intrastate services. This, it is contended, places what might otherwise be services excluded from the coverage of the 1934 Act under § 152 of that Act back under its coverage because of the federal interest and involvement in the collection of the excise taxes. We find the argument tempting but unpersuasive.

Comparing the language of sections 202 and 152, we note that the language which defines the scope of coverage of the two sections is virtually identical. Section 202 prohibits discrimination in "charges, practices, classifications, regulations, facilities, or services for or in connection with like communication services", and section 152 excludes from coverage of the Act all "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications services". If, as McDonnell contends, General Telephone's tax collection practices were in violation of § 202 because they constituted "charges, practices, . . . regulations, . . . or services" relating to communications, then it would be inconsistent to argue that those same tax collection practices are not "charges, . . . practices, services, . . . or regulations" relating to intrastate communications services, because CENTREX was almost certainly solely intrastate.[3]

We hold, therefore, that McDonnell has stated no valid claim for damages based on discrimination under the 1934 Act. In light of this holding, it is unnecessary to consider the effect of the statute of limitations found in 47 U.S.C. § 415(b), which General Telephone claims precludes recovery.

C. Fiduciary Duty

McDonnell's third claim is based on the theory that General Telephone's position as a public utility and as the author of the billing practices in question gives rise to

fiduciary duties owed to its customers which it breached by collecting unnecessary excise taxes from McDonnell for five and one-half years.

McDonnell cites no case authority for the proposition that a public utility such as General Telephone owes a special fiduciary duty to customers from whom it collects taxes on behalf of the government. There are, however, cases which stand for the proposition that no such fiduciary relationship exists. Agron v. Illinois Bell Telephone Co., 325 F. Supp. 487 (N.D. Ill. 1970), rev'd on other grounds, 449 F.2d 906 (7th Cir. 1971), cert. denied, 405 U.S. 954 (1972); Jacob Goodman & Co. v. New York Telephone Co., 285 App. Div. 404, 137 N.Y.S.2d 797 (1st Dep't), aff'd, 309 N.Y. 258, 128 N.E.2d 406 (1955).

McDonnell derives most of the force of its argument from its interpretation of the Federal Excise Tax Reduction Act of 1965 and from the Federal Communications Act of 1934, discussed above. We see no reason to bootstrap from those two statutes and create a third cause of action in addition to the two already alleged. We therefore affirm that part of the lower court's order dealing with a claim for relief based on an alleged fiduciary duty owed by General Telephone to McDonnell.

IV. CONCLUSION

The order of the lower court is affirmed in all respects. It is therefore unnecessary to deal with General Telephone's contention that it is not to proper party from whom to seek the return of overpaid excise taxes.

FOOTNOTES:

[1] Although both General Telephone Company of California and General Telephone and Electronics Corporation were defendants below and are appellees here, our action affects both in the same way, and they will therefore be referred to under the collective term of "General Telephone".

[2] A portion of Judge Weinfeld's opinion hints that the plaintiff there had failed to make a valid claim for relief under § 202 of the 1934 Act (47 U.S.C. § 202). 437 F. Supp. at 1131, 1134. It is unclear whether he meant that any action which was not violative of the 1965 Act also met the anti-discrimination provisions of the 1934 Act, or whether plaintiff there merely failed to make the requisite pleadings and proof to persuade the judge of the merits of its claim. We do not rely on that portion of Judge Weinfeld's opinion in our discussion of the 1934 Act.

[3] We are also unpersuaded by McDonnell's contention that CENTREX is not intrastate service because of the capacity it possesses to be patched into interstate telecommunications nets. Aside from the apparent fact that none of the disputed charges here were for calls made from CENTREX phones into interstate nets, the theory which McDonnell tries to develop is inconsistent with the intent of Congress to preserve some state jurisdiction over telecommunications services. If CENTREX service of the type described here becomes interstate merely because it can be connected with other wire systems that are interstate, then it is difficult to imagine what type of telephone service would not qualify as interstate in a similar manner. The lessons of Kitchen and State Corporation Comm'n, supra, suggest McDonnell's argument should be

discarded, and we do so in light of the facts presented here.

We are likewise unpersuaded by McDonnell's argument that, because General Telephone was declared to be an interstate common carrier in General Telephone Co. of California v. F.C.C., 413 F.2d 390 (D.C. Cir.), cert. denied, 396 U.S. 888 (1969), the antidiscrimination provisions of § 202 of the Act apply here. This misses the point. A carrier may be an interstate "common carrier" within the meaning of § 202 in some instances but not in others, depending on the nature of the activity which is subject to scrutiny. Otherwise, § 152 has little meaning. See National Ass'n of Reg. Util. Com'rs v. F.C.C., 533 F.2d 601 (D.C. Cir. 1976).

CHIEF COUNSEL'S OFFICE
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APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
FEB 16 1979
EARL E. MELEN, JR. CLERK
U. S. COURT OF APPEALS

MCDONNELL DOUGLAS CORPORATION, Plaintiff-Appellant, v. GENERAL TELEPHONE COMPANY OF CALIFORNIA and GENERAL TELEPHONE AND ELECTRONICS CORPORATION, Defendant-Appellee.	No. 75-3131 O R D E R

Before: CARTER, Circuit Judge.

Defendant-appellee General Telephone Company of California is requested to file a supplemental brief responding to plaintiff-appellant McDonnell Douglas' petition for rehearing with suggestion for rehearing en banc, and particularly to the following issue, namely, whether the characterization of CENTREX service as intrastate within the meaning of section 152 of 47 U.S.C. is a disputed question of fact.

FPI-Sandstone
8-23-71—10084—6048

APPENDIX C

FILED
APR 25 1979
EMIL E. MELFI, JR.
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

McDONNELL DOUGLAS CORPORATION, Plaintiff-Appellant, v. GENERAL TELEPHONE COMPANY OF CALIFORNIA and General Telephone and Electronics Corporation, Defendants-Appellees.	No. 75-3131 ORDER DENYING PETITION FOR REHEARING AND REJECTING SUGGESTION FOR REHEARING EN BANC

Before: CARTER and HUFSTEDLER, Circuit Judges, and KRAFT, District Judge.

The panel in the above entitled case having voted unanimously to deny the petition for rehearing; and the suggestion for rehearing en banc having been circulated to all active judges and no judge having voted for a rehearing en banc,

IT IS ORDERED that the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

FPI-Sandstone
8-23-71—100M—4048

APPENDIX D

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
MAY 9 1979
EMIL E. MELFI, JR. CLERK
U. S. COURT OF APPEALS

McDONNELL DOUGLAS CORPORATION,

Plaintiff-Appellant,

v.

GENERAL TELEPHONE COMPANY OF CALIFORNIA and GENERAL TELEPHONE & ELECTRONICS CORPORATION,

Defendants-Appellees.

No. 75-3131

ORDER STAYING ISSUANCE OF MANDATE

Before: CARTER, Circuit Judge

Upon the application of James J. Foley, Esq., counsel for the appellant herein, IT IS ORDERED that the issuance of the certified copy of the judgment of this Court in the above cause be stayed pending the filing of a petition for writ of certiorari to the Supreme Court of the United States, provided such petition is filed in the Clerk's Office of the Supreme Court on or before June 8, 1979.

FOR THE COURT:
by direction

Emil E. Melfi

EMIL E. MELFI, JR.
Clerk of Court

FILED
JUL 18 1979
MICHAEL RODAK, JR., CLERK

APPENDICES

IN THE

Supreme Court of the United States

October Term, 1979

78-1853

MCDONNELL DOUGLAS CORPORATION,
Petitioner,

— against —

GENERAL TELEPHONE COMPANY OF CALIFORNIA
AND
GENERAL TELEPHONE AND ELECTRONICS CORPORATION
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES J. FOLEY
3855 Lakewood Boulevard
Long Beach, California 90640
(213) 593-6245
Attorney for Petitioner

(Filed: June 8, 1979)

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 75-3131

MCDONNELL DOUGLAS CORPORATION,
Plaintiff-Appellant,

v.

GENERAL TELEPHONE COMPANY OF CALIFORNIA AND GENERAL TELEPHONE AND ELECTRONICS CORPORATION,
Defendant-Appellee.

OPINION
JAN. 2, 1979

APPEAL from the United States District Court for the Central District of California

Before: CARTER and HUFSTEDLER, Circuit Judges, and C. WILLIAM KRAFT, JR., District Judge.*

CARTER, Circuit Judge:

McDonnell Douglas appeals here from an order granting General Telephone's[1] motion for summary judgment in a suit in which McDonnell sought to recover excise taxes paid over a five and one-half year period on telephone services provided by General Telephone. The thrust of the district court's order was that McDonnell had failed to state any cause of action under applicable federal statutory or common law.

*Honorable C. William Kraft, Jr., Senior District Judge, Eastern District of Pennsylvania, sitting by designation.

McDonnell's appeal presses the view that at least three causes of action were stated: First, General Telephone's collection of excise taxes between 1966 and 1971 violated a duty imposed on General Telephone by the Federal Excise Tax Reduction Act of 1965, 26 U.S.C. §§ 4251-4254 ("the 1965 Act") to conduct its billing practice so as to confer the benefits of the Act on its customers, including McDonnell. Second, General Telephone's billing practice was discriminatory as to McDonnell and thus violated the anti-discrimination provisions of the Federal Communications Act of 1934, 47 U.S.C. § 202 as amended ("the 1934 Act"). Finally, McDonnell argues that General Telephone violated a fiduciary duty owed to its customers, including McDonnell, when it established and carried out the particular billing practices which resulted in McDonnell's having to pay the disputed excise taxes.

General Telephone argues in support of the district court that no cause of action was stated, and also contends that, as to the claim based on discrimination arising out of the 1934 Act, a statute of limitations would preclude recovery anyway. It also argues that it is not a proper party from whom McDonnell should seek a refund of taxes. Rather, section 7422 (f) (1) of the Internal Revenue Code, 26 U.S.C. § 7422 (f) (1) requires that such action be brought only against the United States.

We find that McDonnell has failed to state any cause of action under the federal statutes cited and under the common law. We therefore affirm the decision of the lower court.

I. FACTS

McDonnell is a long-time customer of General Telephone Company of California, a wholly-owned subsidiary of coappellee General Telephone and Electronics Corp. During the time period relevant to this dispute, McDonnell subscribed to at least two different kinds of telephone service from General Telephone: conventional service which gave McDonnell access to the world-wide commercial telephone communications net available to telecommunications users generally, and a private branch exchange (PBX) system which facilitated

McDonnell's internal communications. General Telephone apparently offered PBX systems in different modes, one of which was called "CENTREX" and which was used by McDonnell in its internal communications.

The seeds of this dispute were sown in 1965 when Congress amended the Internal Revenue Code to exempt "private communications service" from federal communications excise taxes. Federal Excise Tax Reduction Act of 1965, 46 U.S.C. §§ 4251-4254. Under these amendments, PBX systems were intended to qualify for the tax exemption, but only if customer were billed separately for internal and external use. *See* H.R. Rep. No. 433, 89th Cong., 1st Sess. 31 (1965), 1965 U.S. Code Cong. & Admin. News 1645, 1677. CENTREX services received by McDonnell were billed together with conventional telephone services and for that reason, they did not immediately qualify for the exemption. The present dispute matured when General Telephone finally separated its CENTREX and conventional charges at McDonnell's request — five and one-half years after the Excise Tax Reduction Act became effective — but declined to reimburse McDonnell for the taxes paid during that period.

II. ISSUES

A. Does the Excise Tax Reduction Act of 1965 impose a duty upon General Telephone to change its billing practice so as to confer the benefits of the Act on McDonnell?

B. Is General Telephone's billing practice with respect to CENTREX service subject to federal scrutiny so as to give rise to a cause of action under the Federal Communications Act of 1934 where discrimination is alleged? If so, does a statute of limitations bar recovery?

C. Does General Telephone owe a separate common law fiduciary duty to McDonnell to formulate billing policies that would minimize McDonnell's excise taxes?

D.Is General Telephone the proper party from whom McDonnell should seek recovery of the money paid as federal excise taxes?

III. DISCUSSION

A. The 1965 Act

Insofar as it applies to the facts of this case, the 1965 Act provides for an excise tax on local telephone service (26 U.S.C. § 4251(a) (1)), but excludes from coverage of the tax "private communications services . . . [if] a separate charge is made for such service." 26 U.S.C. § 4252(a), (d). Thus McDonnell's CENTREX service was taxed because it was billed to McDonnell along with charges for conventional service. It is clear that Congress contemplated such a result when it passed the 1965 Act. The legislative history of the bill, found in H.R. Rep. No. 433, 89th Cong. 1st Sess. 31 (1965), 1965 U.S. Code Cong. & Admin. News 1645 at 1677 states:

> "It is understood that private lines and PBS systems generally will immediately qualify for this exemption. However, it is understood that Centrex systems – where switching equipment is generally on the premises of the local exchange rather than on that of the subscriber – generally do not, as yet, provide for a charge which is separate and distinct from that for local telephone service. Until such separation is made, this exemption, therefore, will not apply in the case of Centrex service."

McDonnell argues that there is implicit in the Act and its legislative history a duty placed upon utilities providing telephone service to separate charges for CENTREX services so that they qualify for the exemption. It supports this argument with the observation that if the Act does not impose such a duty, then it confers upon General Telephone and other utilities excessive discretion to determine whether or not its customers have to pay federal excise taxes. It looks at the words "as yet" and "until" in the text of legislative history and contends they should be interpreted so as to require a change in a utility's billing practice if the service to which a customer subscribes does not qualify for the exemption.

Essentially identical arguments were made in *DuPont Glore Forgan, Inc. v. Am. Tel. & Tel. Co.*, 437 F. Supp. 1104

at 1131 (S.D.N.Y. 1977), aff'd mem., No. 77-6148, 6154 (2d Cir., March 17, 1978), *cert. denied*, 47 U.S.L.W. 3327 (U.S. Nov. 13, 1978) (No. 78-317). In the portion of that opinion directly applicable to this claim, and with which we generally agree,[2] Judge Edward Weinfeld noted that neither the language of the Act nor the legislative history evidence a clear imposition of a duty to establish separate charges for CENTREX service. Furthermore, making a taxpayer's tax liability dependent upon the actions of one of the parties to a particular taxable transaction is not uncommon under the Internal Revenue Code. It follows, therefore, that General Telephone's discretion to separate or not separate CENTREX charges was absolute under the 1965 Act.

In light of Judge Weinfeld's discussion of this issue in 437 F. Supp. at 1131-34, we find it unnecessary to elaborate or cite further authority. We merely hold, consistent with that decision, that the 1965 Act does not impose a duty upon General Telephone to separate charges for CENTREX services from charges for normal telephone services in its bills to McDonnell.

B. The 1934 Act

McDonnell next claims that General Telephone's billing practice violated the anti-discrimination provisions of the 1934 Federal Communications Act, 47 U.S.C. § 202. That section provides as follows:

> "(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

The discrimination here, McDonnell contends, lies in the fact that its CENTREX costs were higher than fees paid by other

customers of General Telephone who received similar service but happen to have subscribed to a P.B.X. system which was billed separately and thus not subject to the excise tax.

General Telephone counters with the argument that CENTREX service, being entirely intrastate in nature, is exempt from the coverage of the Act under section 152(b) of the Act, which excludes "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier[.]" This provision was clearly intended to give states significant power to regulate wire communications that are wholly intrastate in nature. In the debates which preceded passage of the 1934 Act, Senator Dill, the Senate manager of the bill, stated, apparently with reference to § 152:

> "We have attempted . . . to reserve to the State commissions the control of intrastate telephone traffic [in contrast to the jurisdiction left to the states over intrastate commerce following *Houston, E. & W.T. Ry. v. United States*, 234 U.S. 342 (1914).] . . .
>
> "We have attempted, in this proposed legislation, to safeguard State regulation by certain provision to the effect that where existing intrastate telephone business is being regulated by a State commission, the provisions of the bill shall not apply. . . . " 78 Cong. Rec. 8823 (1934).

Subsequent decisions interpreting the Act have sought to preserve state control against federal jurisdictional encroachment. *See Kitchen v. F.C.C.*, 464 F.2d 801 (D.C. Cir. 1972); *Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 F.2d 486, 494, n. 6 (2d Cir. 1968); *United States v. State Corporation Comm'n*, 455 F. Supp. 843 (E.D. Va. 1972), *aff'd* 409 U.S. 1094 (1973).

We do not wish to unnecessarily expand the scope of federal jurisdiction in this area when it was the clear intent of Congress and other courts to limit that jurisdiction.

Counsel for McDonnell has forcefully and ably argued that what is involved here is not simply intrastate services, as to which the California Public Utilities Commission has ex-

clusive jurisdiction in the first instance, but rather the discriminatory manner in which General Telephone carried out its congressionally mandated duties as a collector of federal excise taxes on those intrastate services. This, it is contended, places what might otherwise be services excluded from the coverage of the 1934 Act under § 152 of that Act back under its coverage because of the federal interest and involvement in the collection of the excise taxes. We find the argument tempting but unpersuasive.

Comparing the language of sections 202 and 152, we note that the language which defines the scope of coverage of the two sections is virtually identical. Section 202 prohibits discrimination in "charges, practices, classifications, regulations, facilities, or services for or in connection with like communication services", and section 152 excludes from coverage of the Act all "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications services". If, as McDonnell contends, General Telephone's tax collection practices were in violation of § 202 because they constituted "charges, practices, . . . regulations, . . . or services" relating to communications, then it would be inconsistent to argue that those same tax collection practices are not "charges, . . . practices, services, . . . or regulations" relating to intrastate communications services, because CENTREX was almost certainly solely intrastate.[3]

We hold, therefore, that McDonnell has stated no valid claim for damages based on discrimination under the 1934 Act. In light of this holding, it is unnecessary to consider the effect of the statute of limitations found in 47 U.S.C. § 415(b), which General Telephone claims precludes recovery.

C. Fiduciary Duty

McDonnell's third claim is based on the theory that General Telephone's position as a public utility and as the author of the billing practices in question gives rise to fiduciary duties owed to its customers which it breached by collecting unnecessary excise taxes from McDonnell for five and one-half years.

McDonnell cites no case authority for the proposition that a public utility such as General Telephone owes a special fiduciary duty to customers from whom it collects taxes on behalf of the government. There are, however, cases which stand for the proposition that no such fiduciary relationship exists. *Argon v. Illinois Bell Telephone Co.*, 325 F. Supp. 487 (N.D. Ill. 1970), *rev'd on other grounds*, 449 F.2d 906 (7th Cir. 1971), *cert. denied*, 405 U.S. 954 (1972); *Jacob Goodman & Co. v. New York Telephone Co.*, 285 App. Div. 404, 137 N.Y.S.2d 797 (1st Dep't), *aff'd*, 309 N.Y. 258, 128 N.E.2d 406 (1955).

McDonnell derives most of the force of its argument from its interpretation of the Federal Excise Tax Reduction Act of 1965 and from the Federal Communications Act of 1934, discussed above. We see no reason to bootstrap from those two statutes and create a third cause of action in addition to the two already alleged. We therefore affirm that part of the lower court's order dealing with a claim for relief based on an alleged fiduciary duty owed by General Telephone to McDonnell.

IV. CONCLUSION

The order of the lower court is affirmed in all respects. It is therefore unnecessary to deal with General Telephone's contention that it is not to proper party from whom to seek the return of overpaid excise taxes.

FOOTNOTES:

[1]Although both General Telephone Company of California and General Telephone and Electronics Corporation were defendants below and are appellees here, our action affects both in the same way, and they will therefore be referred to under the collective term of "General Telephone".

[2]A portion of Judge Weinfeld's opinion hints that the plaintiff there had failed to make a valid claim for relief under § 202 of the 1934 Act (47 U.S.C. § 202). 437 F. Supp. at 1131, 1134. It is unclear whether he meant that any action which was not violative of the 1965 Act also met the antidiscrimination provisions of the 1934 Act, or whether plaintiff there

merely failed to make the requisite pleadings and proof to persuade the judge of the merits of its claim. We do not rely on that portion of Judge Weinfeld's opinion in our discussion of the 1934 Act.

[3]We are also unpersuaded by McDonnell's contention that CENTREX is not intrastate service because of the capacity it possesses to be patched into interstate telecommunications nets. Aside from the apparent fact that none of the disputed charges here were for calls made from CENTREX phones into interstate nets, the theory which McDonnell tries to develop is inconsistent with the intent of Congress to preserve some state jurisdiction over telecommunications services. If CENTREX service of the type described here becomes interstate merely because it can be connected with other wire systems that are interstate, then it is difficult to imagine what type of telephone service would not qualify as interstate in a similar manner. The lessons of *Kitchen* and *State Corporation Comm'n, supra*, suggest McDonnell's argument should be discarded, and we do so in light of the facts presented here.

We are likewise unpersuaded by McDonnell's argument that, because General Telephone was declared to be an interstate common carrier in *General Telephone Co. of California v. F.C.C.*, 413 F.2d 390 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969), the antidiscrimination provisions of § 202 of the Act apply here. This misses the point. A carrier may be an interstate "common carrier" within the meaning of § 202 in some instances but not in others, depending on the nature of the activity which is subject to scrutiny. Otherwise, § 152 has little meaning. *See National Ass'n of Reg. Util. Com'rs v. F.C.C.*, 533 F.2d 601 (D.C. Cir. 1976).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 75-3131

MCDONNELL DOUGLAS CORPORATION,

Plaintiff-Appellant,

v.

GENERAL TELEPHONE COMPANY OF CALIFORNIA AND GENERAL TELEPHONE AND ELECTRONICS CORPORATION,

Defendants-Appellees.

ORDER
FEB. 16, 1979

Before: CARTER, Circuit Judge

Defendant-appellee General Telephone Company of California is requested to file a supplemental brief responding to plaintiff-appellant McDonnell Douglas' petition for rehearing with suggestion for rehearing en banc, and particularly to the following issue, namely, whether the characterization of CENTREX service as intrastate within the meaning of section 152 of 47 U.S.C. is a disputed question of fact.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 75-3131

MCDONNELL DOUGLAS CORPORATION,
Plaintiff-Appellant,

v.

GENERAL TELEPHONE COMPANY OF CALIFORNIA AND
GENERAL TELEPHONE AND ELECTRONICS CORPORATION,
Defendants-Appellees.

ORDER DENYING PETITION FOR REHEARING AND REJECTING SUGGESTION FOR REHEARING EN BANC APRIL 25, 1979

Before: CARTER and HUFSTEDLER, Circuit Judges, and KRAFT, District Judge.

The panel in the above entitled case having voted unanimously to deny the petition for rehearing; and the suggestion for rehearing en banc having been circulated to all active judges and no judge having voted for rehearing en banc,

IT IS ORDERED that the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 75-3131

MCDONNELL DOUGLAS CORPORATION,
Plaintiff-Appellant,

v.

GENERAL TELEPHONE COMPANY OF CALIFORNIA AND
GENERAL TELEPHONE AND ELECTRONICS CORPORATION,
Defendants-Appellees.

ORDER STAYING ISSUANCE OF MANDATE
MAY 9, 1979

Before: CARTER, Circuit Judge

Upon the application of James J. Foley, Esq., counsel for the appellant herein, IT IS ORDERED that the issuance of the certified copy of the judgment of this Court in the above cause be stayed pending the filing of a petition for writ of certiorari to the Supreme Court of the United States, provided such petition is filed in the Clerk's Office of the Supreme Court on or before June 8, 1979.

FOR THE COURT:
by direction

EMIL E. MELFI, JR.
Clerk of Court

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 74-378-F

MCDONNELL DOUGLAS CORPORATION,

Plaintiff,

v.

GENERAL TELEPHONE COMPANY OF CALIFORNIA AND GENERAL TELEPHONE & ELECTRONICS CORPORATION,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
AUG. 8, 1975

The above-entitled action came on for hearing on the motions for summary judgement by defendants (General Telephone Company of California and General Telephone & Electronics Corporation) and plaintiff (McDonnell Douglas Corporation) in their respective favor. The court, having considered the pleadings, the evidence and the oral and written arguments of the parties, now makes its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. Identification of Parties

1.1 Plaintiff McDonnell Douglas Corporation ("McDonnell") is a corporation organized under the laws of Maryland. (Amended Complaint, ¶ 1.)

1.2 Defendant General Telephone & Electronics Corporation ("GTE") is a corporation organized under the laws of New York. (Amended Complaint, ¶ 2.)

1.3 Defendant General Telephone Company of California ("GTC") is a corporation organized under the laws of California. (Amended Complaint, ¶ 3.) GTC is a wholly-owned subsidiary of GTE. (Amended Complaint, ¶ 3; Answer of GTC, ¶ 4; Answer of GTE, ¶ 3.)

1.4 GTC provides telephone communication services to McDonnell. (Amended Complaint, ¶ 3.) The services furnished by GTC to McDonnell include Centrex telephone communication services at McDonnell's facilities in Long Beach and Huntington Beach, California. (Hester Affidavit, ¶¶ 2, 7.)

2. Background Facts

2.1 A conventional Private Branch Exchange ("PBX") telephone communication system provides to a subscriber of PBX service the capability to engage both in intraoffice telephone communications and in telephone communications with the external telephone network. (Amended Complaint, ¶ 4F; Hester Affidavit, ¶ 3.) The switching equipment used in providing conventional PBX service is physically located on the premises of the customer and is connected to the external telephone network by connecting lines ("trunks") to the local exchange of the telephone company which provides the PBX service. (Amended Complaint, ¶ 4F; Hester Affidavit, ¶ 3.)

2.2 Centrex telephone communication service as provided by GTC is a type of dial PBX service. (Amended Complaint, ¶ 4G; Hester Affidavit, ¶ 3.) In a Centrex system furnished by GTC, the switching equipment is located entirely on the premises of GTC. (Amended Complaint, ¶ 4G; Hester Affidavit, ¶ 4.) Centrex switching equipment is connected directly to the external telephone network by numerous connecting links, rather than by a comparatively small number of trunk lines as with conventional PBX equipment. (Hester Affidavit, ¶ 4.)

2.3 A Centrex system offers certain communications features or facilities in addition to those available with a conventional PBX system. (Hester Affidavit, ¶¶ 3-4.)

3. The Federal Excise Tax on Telephone Communication Services

3.1 During the time relevant to this action, telephone communication services that have access to or from the external telephone network have generally been subject to federal excise tax. Internal Revenue Code, 26 U.S.C. §§ 4251-4254. (Amended Complaint, ¶ 5.)

3.2 The Excise Tax Reduction Act of 1965 (the "1965 Act"), 79 Stat. 136 (1965), amended the Internal Revenue Code to exempt "private communications service" from the excise tax imposed on "local telephone service," effective January 1, 1966. 26 U.S.C. § 4252(a). As amended by the 1965 Act, 26 U.S.C. § 4252(d) defines "private communications service" as service and equipment used for intercommunication among a subscriber's telephone stations, "except that such term does not include any [such] communications service unless a separate charge is made for such service." (Amended Complaint, ¶ 5.)

3.3 Centrex service in connection with purely intraoffice telephone communications is a local telephone service which can qualify as "private communications service," and if a separate charge is imposed for such service is therefore exempt from federal excise tax. (Amended Complaint, ¶ 6.)

3.4 The rates charged by GTC for conventional PBX service have always consisted of two separate charges, separately set forth in the applicable tariff filed with the California Public Utilities Commission (the "Commission"). One charge is for the use of the PBX switching equipment located on the customer's premises and the second and separate charge is for the use of the trunks which provide access to the local exchange of GTC and thus access to the external telephone network. (Amended Complaint, ¶ 4F; Hester Affidavit, ¶ 5.)

Because of the existing separation of charges for PBX service, the charge for PBX intraoffice communication service was immediately exempt from federal excise tax on the date the 1965 Act became effective. (*See* Amended Complaint, ¶ 7.)

3.5 Commencing July 25, 1964, when GTC first offered Centrex service to its customers, GTC's charges for Centrex service were governed by a tariff filed with the Commision which imposed a single charge for intraoffice service and exchange access applied against the total number of individual telephone receivers within the system. (Amended Complaint, ¶ 4G; Hester Affidavit, ¶ 6.) Effective August 10, 1971, GTC revised its Centrex tariff on file with the Commission to separately state charges for (1) intraoffice services and (2) exchange access. (*See* Amended Complaint, ¶ 9; Hester Affidavit, ¶¶ 12-13.)

3.6 Prior to August 10, 1971, McDonnell was assessed and paid federal excise taxes on the entire amount of GTC's charges for Centrex intraoffice communication service and exchange access. (Amended Complaint, ¶ 22.) Subsequent to August 10, 1971, McDonnell has not been assessed nor has it paid federal excise taxes on GTC's charges for Centrex intraoffice service. (Amended Complaint, ¶ 25.)

4. The Changeover from a Unitary to Separate Centrex Charges

4.1 Pursuant to a tariff filed with the Commission which became effective in March 1969, GTC was authorized to provide and offered a new type of PBX service which incorporated many but not all of the features and facilities supplied by a Centrex system. As with GTC's prior PBX tariffs, the tariff incorporated two separate charges (i.e., for intraoffice switching and trunk access). (Hester Affidavit, ¶ 8.)

4.2 As a result of a request by McDonnell, GTC commenced studies in the latter part of 1970 preparatory to dividing the single station rate for Centrex service into two

components; (1) a charge for intraoffice communications service and (2) a separate charge for access to and from the external telephone network. (Hester Affidavit, ¶ 9.) Those studies revealed that a separation of charges based on the actual costs associated with supplying each of the two aspects of Centrex service was impractical. (Hester Affidavit, ¶ 11.)

4.3 Since the intraoffice services provided by the more advanced PBX system referred to in subparagraph 4.1, *supra*, were substantially the same as those provided by a Centrex system, GTC determined that the separate charge for Centrex intraoffice services should be the same as the comparable charge for intraoffice services supplied by the more advanced PBX system. The remainder of the previously unitary rate for Centrex service was then allocated as the charge for exchange access in a Centrex system. (Hester Affidavit, ¶ 12.)

4.4 The method of computing the division of the previously unitary Centrex charge into two components as set forth in subparagraph 4.3, *supra*, was not the only method available to GTC. (Hester Supplemental Affidavit, ¶ 5; Evans Supplemental Affidavit, ¶ 5.) The decision by GTC to use this particular method was made in the exercise of rate-making judgment by GTC. (Hester Supplemental Affidavit, ¶ 5.)

4.5 The separation of Centrex charges which became effective August 10, 1971 did not derive from any antecedent separation of such charges which was set forth in GTC's books and records relating to Centrex charges, except as set forth in subparagraphs 4.3 and 4.4, *supra*. Prior to the effectiveness of the revised Centrex tariff there was no separation of any kind of Centrex charges on GTC's books and records. (Hester Affidavit, ¶ 14.)

5. The Intrastate Character of Centrex Communication Services

5.1 Centrex service is a local telephone exchange service. GTC's rates and charges for Centrex service are solely for intrastate communication service and do not include any compo-

nent for interstate communication service. (Hester Affidavit II, ¶ 1.)

5.2 GTC's rates and conditions with respect to Centrex service are contained in tariffs filed with the California Public Utilities Commission. GTC does not make any filings with the Federal Communications Commission with respect to Centrex service. (Hester Affidavit, ¶ 2.)

6. General

6.1 The Court finds in all respects as set forth in the Conclusions of Law following these findings of fact.

CONCLUSIONS OF LAW

(1) The Court concludes in all respects as set forth in the foregoing Findings of Fact.

(2) Said findings having been made upon issues which are determinative of the cause, any further findings or findings upon issues other than those embraced in the foregoing findings would be immaterial and are not made for that reason.

(3) The jurisdiction of this Court is based on 28 U.S.C. §§ 1331 and 1332 and the doctrine of pendent jurisdiction. The amount in controversy in this case exceeds $10,000 exclusive of interest and cost. Venue is proper in this district under the provisions of 28 U.S.C. § 1391.

(4) When Congress enacted the 1965 Act into law, it did not mandate that Centrex charges for intraoffice communications be separately imposed and stated within a reasonable time, or within any time at all.

(5) GTC is required by law to act as uncompensated tax collector on behalf of the United States in collecting telephone excise taxes from McDonnell. 26 U.S.C. § 4291. The relationship between McDonnell as taxpayer of federal telephone excise taxes and GTC as tax collector of such taxes is that of

debtor and creditor, and the status imposed on GTC as tax collector does not give rise to any fiduciary duties owing to McDonnell. GTC's status as tax collector did not thereby impose any obligation or duty on GTC to seek to minimize the telephone excise taxes owing by McDonnell to the United States with respect to Centrex service furnished by GTC to McDonnell.

(6) GTC's manner of charging for Centrex service is a practice required to be incorporated in tariffs filed with the California Public Utilities Commision and subject to its approval. California Public Utilities Code §§ 489, 728 and 761. The lawfulness of GTC's manner of charging for Centrex services depends upon whether such practice is "just and reasonable" within the meaning of California Public Utilities Code § 451.

(7) The California Public Utilities Commission has jurisdiction to determine whether GTC's manner of charging for Centrex service complies with the requirement that it be "just and reasonable." California Public Utilities Code §§ 728, 761. Further, at all relevant times, California Public Utilities Code § 1702 gave to McDonnell the right to initiate proceedings before the Commission to determine whether GTC's manner of charging for Centrex service was not "just and reasonable" and therefore unlawful. If the Commission determined as a result of any such proceeding that the practice was unlawful, it would be required by law to prescribe the practice to be followed thereafter. California Public Utilities Code §§ 728, 761. The Commission at all relevant times had the authority to determine whether, and if so when, GTC should have revised its Centrex tariff to separately impose and state charges for Centrex intraoffice service.

(8) Under California law, McDonnell's right to initiate proceedings before the California Public Utilities Commission was its sole remedy to obtain a determination of whether GTC's manner of charging for Centrex service prior to August 10, 1971 was unlawful. The Commission has exclusive jurisdiction, under California law, to determine whether any

practice subject to its jurisdiction is not "just and reasonable," and therefore unlawful. Accordingly, this Court has no jurisdiction to determine whether GTC's failure to revise its Centrex tariff sooner than August 10, 1971 was unlawful under California law.

(9) Centrex telephone communication service as furnished by GTC to McDonnell prior to August 10, 1971 was "local telephone service" within the meaning of the Internal Revenue Code, 26 U.S.C. § 4252(a). Centrex service is a local telephone exchange service. 47 U.S.C. § 153(r).

(10) Centrex telephone communication service is intrastate communication service subject to regulation by the California Public Utilities Commission, and therefore is not subject to the requirements of 47 U.S.C. § 202, which prohibits discriminatory or preferential rates or practices in connection with interstate communication service. 47 U.S.C. §§ 152(b)(1), 221(b).

(11) The fact, if true, that prior to August 10, 1971, GTC's charges for Centrex service were "separable" by making some mechanical computation using cost data and accounting records available to GTC into separate components, including one for intraoffice communication service, would not give rise to a "separate charge" for Centrex intraoffice communication service within the meaning of 26 U.S.C. § 4252(d). Thus, there was no overpayment by McDonnell prior to August 10, 1971 of federal telephone excise taxes in respect of the Centrex service furnished by GTC.

(12) Any claim for refund of an overpayment of telephone excise taxes may be maintained only against the United States. 26 U.S.C. § 7422(f)(1).

(13) There is no genuine issue as to any material fact, and defendants are entitled to judgment against plaintiff as a matter of law and to recover their costs.

DATED: August 8, 1975.

_____
United States District Judge

Submitted by:

O'MELVENY & MYERS
SIDNEY H. WALL
JOHN H. ZUROMSKIS

By _____
John H. Zuromskis

Approved as to form:

JAMES J. FOLEY

By _____
James J. Foley

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

Juanita M. Newcomb, being first duly sworn deposes and says:

That affiant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years, and not a party to or interested in the within action; that affiant's business address is 3900 Crocker Bank Plaza, 611 West Sixth Street, Los Angeles, California 90017.

That on July 11, 1975, affiant served the within

FINDINGS OF FACT AND CONCLUSIONS OF LAW

upon counsel named below by depositing a true copy thereof in a United States mail box at Los Angeles, California, in a sealed envelope with postage thereon fully prepaid and addressed as follows:

Newman L. Dotson, Esq.
John L. Rich, Esq.
James J. Foley, Esq.
George R. Hill, Esq.
5301 Bolsa Avenue
Huntington Beach, California 92647

That there is a regular communication by mail between the place of mailing and the place so addressed.

Subscribed and sworn to before me this 11th day of July, 1975.

Notary Public in and for the State of California

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 74-378-F

MCDONNELL DOUGLAS CORPORATION,
Plaintiff,

v.

GENERAL TELEPHONE COMPANY OF CALIFORNIA AND
GENERAL TELEPHONE AND ELECTRONICS CORPORATION,
Defendants.

ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AUG. 8, 1975

The motions of defendants (General Telephone Company of California and General Telephone & Electronics Corporation) and plaintiff (McDonnell Douglas Corporation) for summary judgment in their respective favor pursuant to Rule 56 of the Federal Rules of Civil Procedure having come on for hearing before the Court, the Honorable Warren J. Ferguson, District Judge, presiding; the Court having duly heard argument on the issues, and considered the pleadings in the action and the papers and affidavits filed in support of and in opposition to said motions; and a decision having duly been rendered in accordance with the accompanying findings of fact and conclusions of law:

IT IS ORDERED AND ADJUDGED that defendants' motion is granted and plaintiff's motion is denied, that plaintiff take nothing, that the action be dismissed on the merits, and

that said defendants General Telephone Company of California and General Telephone & Electronics Corporation recover of plaintiff McDonnell Douglas Corporation their costs of action.

DATED at Los Angeles, California this 8th day of August, 1975.

UNITED STATES DISTRICT JUDGE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

Juanita M. Newcomb, being first duly sworn deposes and says:

That affiant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years, and not a party to or interested in the within action; that affiant's business address is 3900 Crocker Bank Plaza, 611 West Sixth Street, Los Angeles, California 90017.

That on July 11, 1975, affiant served the within

ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

upon counsel named below by depositing a true copy thereof in a United States mail box at Los Angeles, California, in a sealed envelope with postage thereon fully prepaid and addressed as follows:

Newman L. Dotson, Esq.
John L. Rick, Esq.
James J. Foley, Esq.
George R. Hill, Esq.
5301 Bolsa Avenue
Huntington Beach, California 92647

That there is a regular communication by mail between the place of mailing and the place so addressed.

Subscribed and sworn to before me
this 11th day of July, 1975.

Notary Public in and for the State of
California

APPENDIX G

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 74-378-F

MCDONNELL DOUGLAS CORPORATION,
Plaintiff,

v.

GENERAL TELEPHONE COMPANY OF AMERICA AND
GENERAL TELEPHONE AND ELECTRONICS CORPORATION,
Defendant.

NOTICE OF ENTRY

TO THE ABOVE NAMED PARTIES AND TO THEIR ATTORNEYS OF RECORDS:

You are hereby notified that order granting summary judgment in favor of defendants and denying plaintiff's motion for summary judgment in the above entitled case was entered in the docket on August 8, 1975.

You are also notified that if this case was tried and you introduced exhibits into evidence, they must be claimed at this office after the expiration of thirty days from the receipt of this notice. (After sixty days in cases in which the United States, its officers or agencies were parties) Unless they are claimed within thirty days after the expiration of the above period, they will be destroyed pursuant to Local Rule 20(a). If an appeal is taken they will, of course, be held until the Appellate Court finally determines the matter. Exhibits which are attached to a pleading will not be destroyed but will remain as a permanent record in the case file.

CERTIFICATE OF MAILING

I, Edward M. Kritzman, Clerk, United States District Court, Central District of California, and not a party to the within action, hereby certify that on August 8, 1975, I served a true copy of this notice of entry on the parties in the within action by depositing true copies thereof, enclosed in sealed envelopes, in the United States Mail in the United States Post Office mail box at Los Angeles, California, addressed as follows:

O'Melveny and Myers 611 West Sixth Street Los Angeles, Ca. 90017	James J. Foley, Esq. 5301 Bolsa Avenue Huntington Beach, Ca. 92647

EDWARD M. KRITZMAN, CLERK

BY _____
DEPUTY CLERK

NOTICE

IN ACTIONS ARISING UNDER THE ECONOMIC STABILIZATION ACT AND THE EMERGENCY PETROLEUM ALLOCATION ACT, NOTICES OF APPEAL TAKEN FROM THIS JUDGMENT MUST BE FILED IN THE TEMPORARY EMERGENCY COURT OF APPEALS IN ACCORDANCE WITH THE RULES OF PROCEDURE OF THAT COURT.

Supreme Court, U. S.
FILED
JUL 11 1979
MICHAEL RODAK, JR., CLERK

No. 78-1853

In The
Supreme Court of The United States
October Term, 1979

McDONNELL DOUGLAS CORPORATION,

Petitioner,

— against —

GENERAL TELEPHONE COMPANY OF CALIFORNIA and GENERAL TELEPHONE & ELECTRONICS CORPORATION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RALPH E. ERICKSON
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(213) 556-2345

Attorneys for Respondents General Telephone Company of California and General Telephone & Electronics Corporation

Of Counsel:

ERICKSON, ZERFAS & ADAMS
O'MELVENY & MYERS

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No. 78-1853

In The
Supreme Court of The United States
October Term, 1979

McDONNELL DOUGLAS CORPORATION,

Petitioner,

— against —

GENERAL TELEPHONE COMPANY OF CALIFORNIA and
GENERAL TELEPHONE & ELECTRONICS CORPORATION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondents respectfully urge that the above-styled petition for a writ of certiorari presents no "special and important reasons" (U.S. Sup. Ct. Rule 19, 28 U.S.C.A.) why the Court should exercise its discretion to accept this matter for review. To the contrary, the opinion of the Ninth Circuit Court of Appeals[1] neither conflicts with any other decision of another court of appeals nor decides an important and novel question of federal law, the only criteria among those enumerated in Rule 19.1(a) which petitioner appears to rely on to support its request for review.

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[1] The Ninth Circuit's opinion is now officially reported at 594 F.2d 720.

STATEMENT OF THE CASE

The present case concerns the manner in which respondent General Telephone Company of California ("GTC") charged petitioner McDonnell Douglas Corporation for Centrex telephone service supplied to certain of petitioner's California facilities. During the period at issue, GTC's manner of charging for Centrex service affected the amount of federal communications excise tax imposed in respect of such service.

Centrex is a type of dial Private Branch Exchange ("PBX") telephone service used by large businesses and other organizations. In addition to the usual ability to place and receive calls into and from the world-wide telephone network, telephones (or "stations") in a Centrex system such as that furnished to petitioner may also reach directly any other station within the Centrex system.[2] At all times, GTC's charges for all aspects of Centrex service were governed by tariffs on file with the California Public Utilities Commission.

Originally the federal communications excise tax applied to all local and toll telephone service. However, the Excise Tax Reduction Act of 1965 (the "1965 Act"), 79 Stat. 136 (1965), exempted "private communication service" from the federal communications excise tax beginning January 1, 1966. The 1965 Act provided however that a communication service would not qualify as a tax-exempt "private" communication service "unless a separate charge is made for such service." 79 Stat. 146 (1965), 26 U.S.C. § 4252(d). The Congressional reports on the 1965 Act stated:

[2] There are other discrete incidents and features of Centrex service, such as the ability to arrange conference calls among more than two stations within the system, but they are not material to any issue now presented.

"For the reasons indicated above, your committee's bill provides an exemption from the tax on local telephone service for private communications service if a separate charge is made for this service. It is understood that private lines and PBX systems generally will immediately qualify for this exemption. However, it is understood that Centrex systems — where the switching equipment is generally on the premises of the local exchange rather than on that of the subscriber — generally do not, as yet, provide for a charge which is separate and distinct from that for local telephone service. Until such a separation is made, this exemption therefore, will not apply in the case of Centrex service." H.R. Rep. No. 433, 89th Cong., 1st Session 31 (1965), 1965 U.S. Code Cong. & Admin. News 1645, 1677.[3]

Until August 10, 1971, the applicable GTC tariff on file with the California Public Utilities Commission did not provide for separate charges for the intraoffice or "private" communication portion of Centrex service. There was a single monthly charge for each Centrex station covering the use of that station both for intraoffice communications within the Centrex system and for local telephone service.[4] Accordingly, until August 10, 1971 GTC collected federal excise tax from petitioner on the entire Centrex station rate for Centrex service. Effective August 10, 1971, a new Centrex tariff filed by GTC did separately state charges for Centrex intraoffice communication service, and since that date petitioner has not paid federal excise tax on such service.

[3] The language of the Senate Report in this respect is identical. S. Rep. No. 324, 89th Cong., 1st Sess. 36 (1965), 1965 U.S. Code Cong. & Admin. News 1690, 1726-27.

[4] Charges for long distance (or "toll") telephone calls are tariffed and billed separately, and do not play any part in the present dispute.

Petitioner contends that GTC was obligated to revise its Centrex tariff as soon as possible after the passage of the 1965 Act, so as to qualify petitioner for the exemption from tax on the private communications portion of its Centrex service. By failing to act to effect the tariff revision as quickly as petitioner would have liked, it is claimed that GTC discriminated unlawfully against petitioner as contrasted with users of other types of PBX systems who qualified immediately for the exemption afforded by the 1965 Act.

QUESTION PRESENTED

Did the courts below correctly conclude that GTC's practice with respect to the imposition and collection of charges for the private communication portion of Centrex service falls outside the coverage of the Federal Communications Act?

REASONS FOR DENYING THE WRIT

Petitioner argues that the opinion of the Ninth Circuit erroneously restricts the jurisdictional reach of the Federal Communications Act of 1934 (the "Communications Act"), 48 Stat. 1064 (1934), as amended, 47 U.S.C. §§ 151-223. The Ninth Circuit concluded that GTC's practice with respect to the manner of combining or separating — in its tariffs filed with the California Public Utilities Commission — charges for the private communication portion of Centrex service was a matter concerning intrastate communication service. The court thus held that the subject was excluded from the coverage of the Communications Act by the express terms of section 2(b), as amended, 47 U.S.C. § 152(b).

The Communications Act evinces a clear Congressional intent to reserve to the states exclusive jurisdiction

over intrastate telephone services. Section 2(b) of the Communications Act, 48 Stat. 1064 (1934), as amended, 47 U.S.C. § 152(b), provides in pertinent part:

> "Subject to the provisions of section 301 of this title [not applicable here], nothing in this chapter shall be construed to apply or to give the [Federal Communications] Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier. . . ."

Section 221(b) of the Communications Act, 48 Stat. 1080 (1934), as amended, 47 U.S.C. § 221(b), reserves to the states jurisdiction over telephone exchange service, *even though a portion of such service constitutes interstate communication:*

> "Subject to the provisions of section 301 of this title [not applicable here], nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority."

The legislative history of the Communications Act confirms that these provisions were intended to reserve "to the States exclusive jurisdiction over intrastate telephone and telegraph communication." S. Rep. No. 781, 73d Cong., 2d Sess. 3 (1934). As Senator Dill, the Senate manager of the bill that became the Communications Act, explained:

"We have attempted in title I to reserve to the State commissions the control of intrastate telephone traffic. We have kept in mind the fact that the Interstate Commerce Commission, through the Shreveport decision and the decisions in other similar cases, has gone so far in the regulation of railroads that the so-called 'State regulation' amounts to very little.

"We have attempted, in this proposed legislation, to safeguard State regulation by certain provisions to the effect that where existing intrastate telephone business is being regulated by a State Commission, the provisions of the bill shall not apply. . . ." 78 Cong. Rec. 8823 (1934).

Petitioner argues that there is a sufficient interstate communication nexus to its claim by virtue of the fact that Centrex stations may be interconnected with the interstate telecommunications network. This contention was disposed of by a footnote in the Ninth Circuit's opinion,[5] and plainly has no merit.

The Federal Communications Commission (the "Commission"), with respect to terminal equipment and so-

[5] 594 F.2d at 724 n.3, which states: "We are also unpersuaded by McDonnell's contention that CENTREX is not intrastate service because of the capacity it possesses to be patched into interstate telecommunications nets. Aside from the apparent fact that none of the disputed charges here were for calls made from CENTREX phones into interstate nets, the theory which McDonnell tries to develop is inconsistent with the intent of Congress to preserve some state jurisdiction over telecommunications services. If CENTREX service of the type described here becomes interstate merely because it can be connected with other wire systems that are interstate, then it is difficult to imagine what type of telephone service would not qualify as interstate in a similar manner. The lessons of *Kitchen* [*Kitchen v. F.C.C.*, 464 F.2d 801 (D.C. Cir. 1972)] and *State Corporation Comm'n* [*United States v. State Corporation Comm'n*, 345 F. Supp. 843 (E.D. Va. 1972), *aff'd* 409 U.S. 1094 (1973)] *supra*, suggest McDonnell's argument should be discarded, and we do so in light of the facts presented here."

called interconnect equipment capable of facilitating both intrastate and interstate communication services, has sought to regulate such facilities only where it has proven difficult or impossible to separate the two types of communications. *Telerent Leasing Corp.*, 45 F.C.C.2d 204 (1974), *aff'd sub nom. North Carolina Utilities Comm'n v. F.C.C.*, 537 F.2d 787 (4th Cir. 1976) (facilities found to be "used in common and indivisibly," 45 F.C.C.2d at 215); *U.S. Dept. of Defense v. General Telephone Co. of California*, 38 F.C.C.2d 803, *aff'd sub nom. St. Joseph Telephone & Telegraph Co. v. F.C.C.*, 505 F.2d 476 (D.C. Cir. 1974); *AT&T-TWX*, 38 F.C.C. 1127, 1133 (1965) ("a single unified regulation pattern" was found to be "essential" in a system with vital national functions and no substantial and important local capabilities, 38 F.C.C.2d at 813-815). In *People of the State of California v. F.C.C.*, 567 F.2d 84 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978), the court upheld the Commission's refusal "to assert jurisdiction over those purely local services that could be practically separated from interstate services supplied through the same facilities. The Commission refused to assert authority over local exchange service, leaving any regulation over such service to the appropriate state bodies." 567 F.2d at 86.

In *North Carolina Utilities Comm'n v. F.C.C.*, 537 F.2d 787 (4th Cir. 1976), the Fourth Circuit also has confirmed this view of the division of jurisdiction accomplished by the Communications Act. The court observed that it had "no doubt that the provisions of section 2(b) [of the Communications Act, as amended, 47 U.S.C. § 152(b)] deprive the Commission of regulatory power over local services, facilities and disputes that in their nature and effect are separable from and do not substantially affect the conduct or development of interstate communications." 537 F.2d at 787. The court found that the

legislative history of the Communications Act established that "the purpose of section 2(b) is to restrain the Commission from interfering with those essentially local incidents and practices of common carriage by wire that do not substantially encroach upon the administration and development of the interstate telephone network." 537 F.2d at 794 n. 6.

The very nature of the present dispute demonstrates convincingly that the practice which gave rise to petitioner's claim is necessarily and conveniently separable from any aspect of interstate communication service. That portion of Centrex service which petitioner contends should have been separately charged for so as to provide exemption from excise tax is carved out by the 1965 Act itself as "private communication service." To the extent any communication service facilitated by a Centrex system constitutes interstate communications, it would not be "private communication service" and therefore petitioner would not have been exempt from excise tax in any event.

What is more, in the proceedings below petitioner lacked and expressly disclaimed any interest in attempting to show any attributes of or effects on interstate communications arising from the disputed practice. Thus, before the District Court petitioner stated "categorically that its [position] is not concerned with rates, the jurisdiction of the FCC or any other public utility commission and is not based on any allegation that Centrex is interstate communications." R. 376, lines 28-31.[6] The disclaimer apparently results from the fact that throughout the proceedings in this case, petitioner has stubbornly clung to the mistaken position that because GTC has been

[6] The designation "R. 376, lines 28-31" is to page 376 of the Clerk's Record on appeal to the Ninth Circuit, a copy of which is attached hereto as Appendix A.

determined to be a "carrier" within the meaning of the Communications Act for certain purposes,[7] all of the provisions of the Communications Act always apply to all of GTC's activities. What petitioner has failed to perceive is that section 2(b)(1) of the Communications Act, as amended, 47 U.S.C. § 152(b)(1), excludes from the application of the Communications Act those activities of "carriers" that are intrastate in nature, even though other activities of the "carrier" may be subject to the provisions of the Communications Act. *See, e.g., National Ass'n of Regulatory Utility Comm'rs v. F.C.C.*, 533 F.2d 601, 607-08 (D.C. Cir. 1976) (opinion of Wilkey, J.).[8]

[7] Citing *General Telephone Co. of California v. F.C.C.*, 413 F.2d 390 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969) and *Ward v. Northern Ohio Telephone Co.*, 300 F.2d 816 (6th Cir. 1962).

[8] Nor does the fact that the practice in question affected petitioner through the means of the federal excise tax somehow invest the dispute with an interstate or federal character. In *Carrigan v. Sunland-Tujunga Telephone Co.*, 263 F.2d 568 (9th Cir.), *cert. denied*, 359 U.S. 975 (1959), the appellant argued that the definitions of local and toll telephone services for purposes of the intrastate telephone rates established by state regulatory authorities are required to conform to the federal communications excise tax definitions of the same terms. The Ninth Circuit rejected that argument:

> "The fundamental legal question with respect to appellant's alleged claim is whether §§ 4251, 4252 and 4254 of the Int. Rev. Code limit state utilities commissions in establishing schedules for intrastate telephone calls.
>
> "The district court judge concluded they do not. We agree.
>
> "The Internal Revenue Code imposed federal taxes, as it had a right to do. The Commission fixed the telephone rates as it had a right to do. The Commission's rates had nothing to do with the federal tax and the federal tax had nothing to do with fixing the rates, but was on them as fixed." 263 F.2d at 571.

That holding represents an application of the general principle that "[s]tate law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed." *Morgan v. Commissioner*, 309 U.S. 78, 80 (1940).

CONCLUSION

The decision of the Ninth Circuit correctly applied the express language of the Communications Act, was fully consonant with the intentions evidenced by the legislative history of the Communications Act, conformed to the Commission's own interpretation and application of the Communications Act, and is supported by the decisions of other courts of appeal that have considered the same or similar issues. Petitioner has failed to make out any "special and important" reasons why this Court should undertake to reexamine the Ninth Circuit's disposition of this matter.

Respectfully submitted,

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Appendix A

Several sections such as Sections 201, 203, 204 and 205 do speak to Commission (FCC) authority. Section 202 does not. Section 206, upon which Plaintiff relies, speaks to "carrier's liability for damage" and states that "In case any common carrier" violates the prohibitions of this chapter, such "common carrier" shall be liable to the person or persons injured thereby for the full amount of damages sustained. This section does not speak to authority of the Commission nor is it limited to interstate communications.

Section 207 entitled "Recovery of damages" states that "any person claiming to be damaged by any common carrier may bring suit . . . in any district court of the United States of competent jurisdiction" or "make complaint to the Commission." Once again, this statute refers to common carriers and specifically grants jurisdiction to the District Court without "Commission" involvement. The law is clear. The facts as they relate to the law are undisputed. "Centrex service offered by General Telephone Company is a type of dial private branch exchange ("PBX") service." [Affidavit of Richard L. Hester in Support of Motion for Summary Judgment, Para. 3, p. 2.]

As a Centrex "PBX" user, Plaintiff was charged federal excise tax disproportionately to other PBX users and were damaged thereby. Defendants have stretched and strained in their Statement of Proposed Genuine Issues and in their Memorandum in Opposition to Plaintiff's Motion for Summary Judgment to stylize Plaintiff's Motion as being a rate matter, a matter for factual determination by the Commission, and raising a question as to what is interstate communications. Plaintiff hereby states categorically that its Motion is not concerned with rates, the jurisdiction of the FCC or any other public utility commission and is not based upon an allegation that Centrex is interstate communications. Plaintiff submits that clearly this Court has jurisdiction under

2.

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